No. 215 33

Brief of Johnson, Briesen & Knauth
for Petitioner.

Filed Mar. 8, 1900

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JAMES H. McKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 215.

EMILIE SAXLEHNER, PETITIONER,

vs.

ALEXANDER NIELSEN.

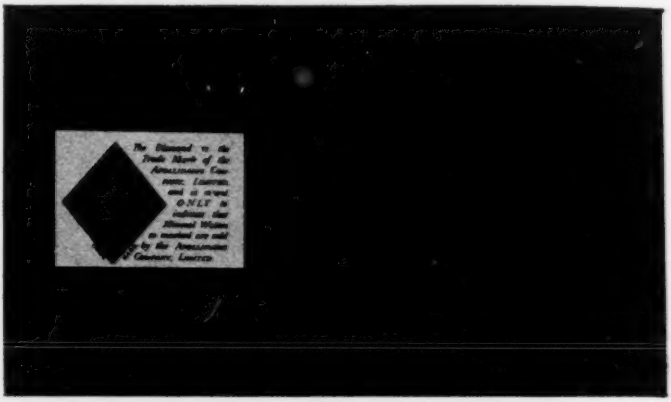
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

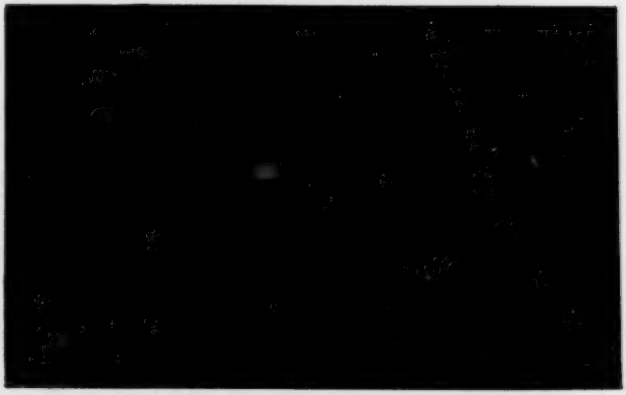
JOHN G. JOHNSON,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Of Counsel for Petitioner.

Complainant's Labels.

"Exhibit A."

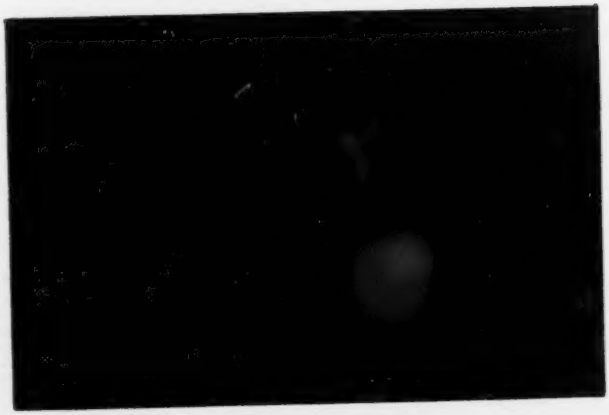


"Exhibit B."



Defendant's Label.

"Exhibit O."



Supreme Court of the United States.

No. 215.

EMILIE SAXLEHNER, Petitioner,
Complainant-Appellant,

vs.

ALEXANDER NIELSEN,
Defendant-Appellee.

BRIEF ON BEHALF OF COMPLAINANT AS PETITIONER AND APPELLANT.

The above entitled case is before this Court by virtue of a writ of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The facts and questions involved in it are in many respects similar to those involved in the cases of the same complainant and petitioner, Nos. 211, 212, 213 and 214; but there is a separate record of the pleadings and proofs presented for this case, No. 215, which was defended by other counsel, and without any stipulation connecting the case with the four cases preceding it on the calendar. It was decided by the courts below mainly upon the strength of the proofs adduced by the defendant Eisner & Mendelson Company in the case No. 211 against the protest of complainant's counsel, who

claimed that the present case should be decided on its own proofs and merits.

The bill of complaint complained of infringement of complainant's trade-mark rights to the name "Hunyadi," and the red and blue label used by complainant for the "Hunyadi Janos" water in this country, by reason of defendant's use on competing bitter waters of a similar red and blue label bearing the name "Hunyady Lajos," and an arrangement of a medallion picture and accompanying print, all devised in close simulation of the "Hunyadi Janos" label. It alleged that the defendant's water was imported by him from one Louis Schmidthauer, the owner of a spring at Kocs in Hungary and as whose "sole agent" defendant represents himself on the bottles of this bitter water. It further alleged that the trade-mark "Hunyady Lajos," which had been used by said Schmidthauer for this water in Hungary, had been canceled by a final decree of the Hungarian Minister after a litigation had by the complainant with Schmidthauer in Hungary, and that by the laws of Hungary the further use of the name "Hunyady Lajos" was forbidden to said Louis Schmidthauer, his agents and employees. It prayed for an injunction against the use of the name and the label, an account of profits and damages and costs (Record, p. 5).

The defendant's answer pleaded that the name "Hunyadi" and the complainant's style of bottles, capsules and labels had become generic for Hungarian bitter waters and that they had been abandoned to the public by the acquiescence and consent of complainant in and to their general use by other dealers. No abandonment by positive affirmation or action was pleaded, but the defendant alleged "that in view of the proprietary rights acquired by "this defendant and others, by virtue of such ac- "quiescence, abandonment, and the laches of the "complainant and her predecessor, it would be in- "equitable to disturb the defendant from continuing "to do the acts complained of."

The answer failed to state what proprietary rights the defendant, who claimed to be an agent of Schmidthauer, had acquired, and there is no intimation in the proofs of their existence (Record, pp. 101–102).

The Circuit Court in its opiniou, rendered on June 30, 1898, held with reference to this infringement as follows:

> "*The firm of Bell, Pollitz & Co., of which Nielsen was a member, began to import Hungarian bitter water into this country in* 1892, *under the name of 'Hunyady Lajos,' and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary, and the importers used the label because it was associated in the minds of the public with the character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water, and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved and when Neilsen took the business upon himself, but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October,* 1896. *The complainant is not chargeable with laches in not taking earlier measures to suppress the defendant's use of the label*" (Record, p. 151).

The Circuit Court also held that there could be no decree against the use of the name "Hunyadi," but granted a decree for an injunction against the infringement of complainant's red and blue label, and

an accounting of the damages arising from the infringements since the defendant's sole ownership of the business.

An interlocutory decree was entered in conformity with this opinion (Record, p. 152), from which both parties appealed to the Circuit Court of Appeals. Complainant's petition for such appeal is found on page 153 of the Record, and complainant's assignment of errors on page 155.

The Circuit Court of Appeals decided the case wholly in favor of defendant, rendering an opinion as follows:

> "PER CURIAM: *The questions raised in this cause are substantially the same as in Saxlehner* v. *Eisner & Mendelson decided herewith. The Circuit Court held that complainant had no exclusive right in this country to the name 'Hunyadi,' in which conclusion we concur. The Circuit Court further granted an injunction against the continued use of the red and blue labels, and an accounting for past infringements by the use of such labels. For reasons stated in the Eisner case the decree as to the labels is reversed, and cause remitted with instructions to dismiss the bill, with costs of this appeal*" (R., p. 163).

A decree of dismissal was thereupon entered (Record, p. 164), whereupon a motion for rehearing was made to bring to the attention of the Court the provisions of the treaty between the United States and the Austro-Hungarian Empire of November 25, 1871, but the motion for a reargument was denied (Record, pp. 165–167). On March 8, 1899, a writ of *certiorari* was granted by this Court (Record, pp. 168–9).

Complainant's title was clearly proved.

The adoption of the name "Hunyadi" as the name of Saxlehner's spring of bitter water in the year 1863 was shown by a certificate of the Municipal Council of Buda dated January 19, 1863 (Record, p. 79), and by other similar certificates which were all offered in evidence without objection. It was shown that Andreas Saxlehner, complainant's predecessor in business, had been in the uninterrupted enjoyment of the name "Hunyadi Janos" as a trade-mark for bitter water ever since 1865 in Hungary; that this name had in the course of time also become the name of the bitter water establishment conducted by Andreas Saxlehner, and up to the present time had been continuously the name of the water as sold in the markets of the world They also showed that in the year 1873 Andreas Saxlehner registered a trade-mark in Hungary for this bitter water, in which the name "Hunyadi Janos" was contained. This trade mark was re registered by the complainant in Hungary in the year 1890, complainant continuing the business as the legal heir and successor of Andreas Saxlehner (see Complainant's Exhibits Nos. 18, 19, 20, 22, 24, 25, and 26, Record, pp. 79 to 89).

The proofs also showed that bitter water coming from other springs in Hungary, like the "Deak Ferencz" (Franz Deak), the "Franz Joszef," the "Hildegarde," the "Szechenyi" and the "Æsculap" springs was sold in Hungary and elsewhere and in the markets of this country and continued to be sold under these other names and labels differing from those used by Saxlehner, which waters have never been called "Hunyadi" in this country or elsewhere (Record, pp. 31–33).

The sales of complainant's "Hunyadi Janos" water in this country since about 1870, first under a red and white label and afterwards under the red and blue label, were proved by complainant's wit-

nesses Adolph de Bary (Record, p. 37); Seymour McCullagh (Record, p. 8), John R. Agnew (Record, p. 49), and others. Their testimony established that for many years past, even previous to the year 1876, the "Hunyadi Janos" water has been known in the United States as "Hunyadi Water," which soon became its short colloquial name, and that it has continued to be recognized by the medical profession and the trade as the only water properly so named, and is still bought and sold in the United States as "Hunyadi" water. The testimony of a large number of witnesses supported this contention of the complainant.

The defense that the name "Hunyadi" and the label have become generic for Hungarian bitter waters is not sustained by the proofs.

In order to sustain the allegations of the answer, defendant called three witnesses, Charles O. Weisz, Theodore W. Edwards and Isidor Haldenstein.

Weisz very clearly testified that the name "Hunyadi" had not become generic in the sense of being synonymous with Hungarian bitter water, because he kept other Hungarian bitter water from Buda Pest in stock and for sale during the whole period of time testified to by him, which was not known or sold or demanded under the name "Hunyadi." He admitted that various imitations of Saxlehner's "Hunyadi Janos" water, which he sold for several years past, were named "Hunyadi" by him in his trade with other druggists, retailers, only because the name "Hunyadi" was on the label. Even then the name Hunyadi was only used in connection with some other name. His testimony, therefore, only establishes the existence of a number of imitations on the market without establishing anything further. He is the same witness who in the case against the

Eisner & Mendelson Company frankly admitted that whenever GENUINE "Hunyadi" was asked for he always gave and would give out "Hunyadi Janos" water (Record, pp. 103 to 116 and 132).

Defendant's witness T. W. Edwards likewise frankly confessed that the "Hunyadi Janos" water always was and still is the only water known to him which rightly deserves the name "Hunyadi." He testifies that if a customer comes to him demanding a bottle of GENUINE "Hunyadi," he furnishes him "Hunyadi Janos," and does the same whenever the customer simply asks for a case of "Hunyadi." This is invariably his practice, and has been the rule of his house, which is a large wholesale house (Record, p. 149). His testimony that he does not call the "Hungaria" water, or the "Apenta" water, or the "Franz Josef" water, which are all Hungarian bitter waters, "Hunyadi" waters would alone dispose of the contention that "Hunyadi" had become a generic name for Hungarian bitter waters (Record, p. 148).

These two witnesses, therefore, admitted that the other so-called "Hunyadi" waters were spurious, and were only called by complainant's name because that name was on the label.

The only witness who pretended to testify on defendant's behalf, that the name had become generic in this country is Isidor Haldenstein. Haldenstein was formerly in the employ of the Apollinaris Company, Limited, or its local agents in New York City, and in that character assisted the Apollinaris Company in carrying out its disloyal scheme to introduce in place of Saxlehner's water a "New Hunyadi" water at the termination of the contract with Saxlehner. The malicious character of Haldenstein's testimony is apparent from his insinuations of unfair dealing on the part of Saxlehner, which insinuations had been completely disproved in the litigation between the Apollinaris Company and Paul Scherer (27 F. R., p. 18), and from his studied attempt to make it appear that *all* Hungarian bitter waters had

for the last six years or more been imported under names employing "Hunyadi," and under red and blue labels. This is contradicted by defendant's other witnesses (Record, p. 138). He even goes so far as to reproach complainant for confusing and disturbing the trade in these fraudulent waters by intimidating circulars (Record, p. 142), and throughout his testimony will be found a desire to magnify and justify the importation of the fraudulent labels.

The table of importations of the waters coming in under imitating labels which was prepared by the witness was offered in evidence over the objection of complainant's counsel that it was incompetent evidence (Record, p. 118), and this objection was repeated when, upon cross-examination, it was further ascertained that the statements contained in that table were clearly based on hearsay evidence making any investigation of their truth impossible (Record, p. 130). We submit that the character of the evidence furnished by him is such that his mere assertion of the fact that the name and label had become generic for Hungarian bitter waters in this country is not entitled to consideration.

The substance of his testimony was that from the year 1886 to the year 1896 *the trade* understood "Hunyadi" to represent one of various aperient waters coming from the neighborhood of Budapest, Hungary, and not Saxlehner's water alone, and that these various waters were distinguished in the trade by the different suffixes added to the name "Hunyadi" (Record, pp. 117 to 121). No attempt was made to show what the *public* meant by the use of the name "Hunyadi," and the knowledge and power to distinguish on the part of the trade can readily be admitted by complainant. This defense was very thoroughly considered by the U. S. Circuit Court of Appeals in the recent case of *Pillsbury* vs. *Pillsbury-Washburn Flour Mills Co.*, 64 *F. R.*, 841, 849, and was scathingly denounced by Jenkins, Circuit Judge, who delivered the opinion of the Court. Speaking of the defendant's claim that by

adding to the objectionable words others which truly described and distinguished his goods, he said:

> *" They sell their goods with the false and simulated brands upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the retail dealer their mode of procedure and their object. They appeal to the greed of their customers to purchase an inferior quality of flour thus falsely branded with the name of a superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good-will. In the large, bold, displayed words: 'Pillsbury's Best' and 'Pillsbury's Best XXXX,' they address the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. True representations in aid of false ones, but aggravate the fraud."*

Complainant proved by an abundance of testimony of physicians, druggists and dealers in mineral waters that even at the present time the public understands under the name "Hunyadi" only Saxlehner's "Hunyadi Janos" water, and that any other bitter waters bearing similar names and labels are recognized by our public as imitations.

A number of physicians of high standing were called as witnesses by the complainant, among whom was the Medical Health Commissioner of the City of New York (Dr. Fowler), and the sum and substance of their testimony was that physicians who prescribe and patients who use "Hunyadi" water mean complainant's water when referring to or speaking of "Hunyadi Water." We refer the Court to the depositions of Doctors Robert M. Taft (Rec-

ord, p. 61); Augustus Caillé (Record, p. 62); James H. Dew (Record, p. 63); William A. Ewing (Record, p. 64); Charles A. Kinch (Record, p. 70), and George B. Fowler (Record, p. 71).

This proof shows that for a period of nearly thirty years complainant's "Hunyadi Janos" water has been and still is sold on the market of this country as "Hunyadi" water, and is the only water recognized by the public to be entitled to that name.

The depositions of the druggists Martin Held and Max Wustrow show that in certain localities druggists have been acquainted with other Hungarian bitter waters sold under red and blue labels and under names of which the name "Hunyadi" formed a part. It appears quite clearly, however, from their testimony that the druggists well knew the "Hunyadi Janos" water to be the water which has given reputation to the name "Hunyadi," and that the public expect to obtain the complainant's water when demanding "Hunyadi Water." Similar testimony was given by John R. Agnew, accountant in the employ of Park & Tilford (Record, pp. 52, 48 and 49).

We submit that the evidence of the defendant utterly failed to establish the fact that either the label or the name of complainant's bitter water had lost its meaning. Falling far short in this, the evidence was without force as a defense and was incompetent to prove any defense, especially where no knowledge of the fraudulent practice by the complainant was proved.

Taylor vs. *Carpenter*, 2 *Wood & M.* 1.

The Circuit Court's finding of fraud was well supported by the evidence.

A comparison of the bottles sold by the defendant with complainant's bottles of Hunyadi Janos Water

shows at a glance the intention of deception. The label has the same characteristic division into three panels, the middle panel being of a reddish brown, similar to the color of complainant's middle panel; the name "Hunyady Lajos" is printed in conspicuous characters above and below the medallion with the portrait, and underneath the same is a cautionary notice very similar to that contained on Saxlehner's bottles. The blue side panels contain printed directions in a manner similar to those on Saxlehner's bottle, and above the lable runs a strip of bluish paper all across the label with words printed in black type, all as on Saxlehner's label. This, added to the characteristic and unusual shape of the bottle, with its short neck and straight sides and with the capsule on which the portrait is impressed surrounded by the inscription "Hunyadi Lajos Keserüviz," and with the impression in the bottom of the bottle of the name "Hunyady Lajos," could only be the result of a very studied effort at imitation and deception. There is no Hunyady Lajos known to history, and as Pollitz, the defendant's former partner, testifies, the name was purely selected for the purpose of having "Hunyady" on the bottle. The same intention prevailed in selecting the colors and arrangement of the label (Record, pp. 52–56). No attempt at denial has been made by the defendant, who did not come forward to testify on his own behalf.

The cautionary notice on defendant's bottles says that the name "Schmidthauer Lajos" is impressed upon the metal capsule, but this is not true. The capsule shows in fact the impression of the name "Hunyady Lajos." The defendant adds to that the statement on the bottle, "Counterfeits of the water as well as imitations of the capsule or the label are subject to penal prosecution. Only strict attention to the label will protect against deceptions." Noth ing could be better designed to awaken among unwary purchasers the belief that this and no other

was the genuine water. Defendant's water does not even come from the neighborhood of Budapest, but from a spring situated at Kocs, more than a hundred miles from Budapest and is, of course, of a different character. Its analysis is totally different from that of the Hunyadi Janos water, as will be seen by comparing the analyses on the two bottles. It has no reputation of its own, nor does it apparently make any difference to Schmidthauer what kind of water it is that he sells under the name, or where he takes it from. He appears to have had two such springs successively. The first Hunyady Lajos Spring was situated at Nagy Igmand. This spring having been closed by the authorities for sanitary reasons, he called another spring (at Kocs) "Hunyady Lajos," and continued to take the water from the latter spring (Record, pp. 93–96).

The effect of the use of this label and name by defendant in this country is shown by the evidence of Tito Toscani, who summed up his experience in canvassing the trade in this country as follows:

> "*I found that it was the smaller druggists that would usually sell the Hunyady Lajos water for the genuine Hunyadi Janos. The old established houses and larger houses in the country would tell me that they only sold the genuine Hunyadi Janos and would not have anything to do with the imitations, having known the Hunyadi Janos for from eighteen to twenty years.*"

He brought specific proof of several fraudulent substitutions by druggists and no attempt was made to disprove or even challenge his statements (Record, pp. 41–43). Similar evidence was given by William Stempel (Record, pp. 44–48).

Neither the decision of the Circuit Court nor that of the Circuit Court of Appeals can be sustained on the proofs in this case.

The opinion of the Circuit Court referred to the case against the Eisner & Mendelson Company, decided by the Court at the same time, and then continues:

> "*The record in this case is much shorter and gives the Hunyadi history in a somewhat disjointed way, but the conclusion that the complainant had no exclusive right in this country after the year* 1888 *to the name Hunyadi is unaltered.*" * * * "*There can be no decree against the use of the name Hunyadi*" (Record, p. 151).

In the case against the Eisner & Mendelson Company the same court had come to the conclusion, upon the proofs offered in that case, that the complainant had by the "positive acts and affirmations of its consignee, the Apollinaris Company, Limited," *abandoned* any exclusive claim to the name Hunyadi, for which reason it denied an injunction on the name. Whatever may be the merits of the defendant's proofs in the case against the Eisner & Mendelson Company, we submit that the present case does not contain those proofs or any proofs upon which the Court could come to the conclusion that the name had been abandoned and likewise that the Circuit Court of Appeals could not conclude upon *these* proofs that complainant was guilty of laches, a conclusion not shared by the Circuit Court.

The complainant proved an undoubted title to the name "Hunyadi" and to the red and blue label of the Hunyadi Janos water by first adoption and use in this country. She proved title to the name further by the certificate of registration of the trade-mark

" Hunyadi " registered by Andreas Saxlehner in the United States Patent Office on April 5, 1887 (Record, p. 98). She also proved that the Hunyadi Janos label was registered in the Chamber of Commerce and Industry of Budapest, so as to call into action the provisions of the treaty between this country and the Austro-Hungarian Empire of the year 1871 for her protection (Record, pp. 82 to 85).

Complainant having thus proved a clear title to the name " Hunyadi " and to the red and blue label and having shown that defendant had adopted a similar label and a similar name for no other purpose than that of *fraudulently* trading upon the reputation of complainant's bitter water, it was incumbent upon the defendant to prove a conclusive defense to the suit in order to entitle him to a decree dismissing the bill.

The record in the case shows that there have been infringements on the markets of this country for a number of years, since about 1888, but it does not show that complainant had any knowledge thereof. It also shows that previous to the year 1890 complainant had no relief in Hungary against these imitations on account of a lack of statutory protection (Record, pp. 36, and 22 to 23), and that as soon as statutory protection in Hungary made a proceeding against infringers possible there, it was instituted and carried on from the year 1891 until the fall of 1896 (Record, pp. 22 to 23). The decree against Louis Schmidthauer, which was the final outcome of these proceedings, was rendered on October 9, 1896, and canceled Schmidthauer's illustrated trademark called " Hunyady Lajos," registered by him on July 16, 1894, sub. No. 37, on the ground of its unlawful similarity to Saxlehner's label and also on the ground of its use of the name " *Hunyady* " (Record, pp. 92 to 93). The record also shows that as early as the year 1886 Louis Schmidthauer had registered a trade-mark for Hunyady Lajos bitter water, which he at that time drew from a spring at Nagy Igmand. This was canceled pur-

suant to an order of the Hungarian Minister of Commerce, issued March 19, 1894, as a result of the suit instituted by complainant in 1891 (Record, p. 89). The second Hunyadi Lajos label registered by Schmidthauer in Hungary on July 16, 1894, sub. No. 37, was canceled in accordance with the decree of the Minister, of October 9, 1896, on or before March 24, 1897 (Record, p. 90).

This proves by documentary evidence, which was not objected to on the ground of incompetency, what the witness Kalman Saxlehner had testified to from his general knowledge of the circumstances, and shows that substantially the same questions which are here before the Court (excepting the colors of the labels which were red and white in Hungary) were litigated between this complainant and this defendant's principal in Hungary from the summer of 1891 until October, 1896, when complainant obtained a final victory. The first importations of the "Hunyady Lajos" water into this country took place in 1892, and after complainant had commenced her litigation against Schmidthauer, and defendant, as Schmidthauer's agent, must be presumed to have had knowledge of complainant's suit against his principal. He can plead neither ignorance nor innocence. Under these circumstances it seems inconceivable how complainant could be justly accused of laches in not proceeding sooner against this defendant who professed to act as the "Sole Agent" of Louis Schmidthauer in the United States. We will not repeat the arguments which we have made on this point in the case against the Eisner & Mendelson Company, which all apply to the present case with the same force.

Neither is there any ground upon which the defendant could claim an equitable estoppel. He does not claim to have known anything of the litigations commenced by the Apollinaris Company, Limited, against Andres and Ungar in the year 1886, and discontinued in the year 1888, nor does he claim to have known anything of the circulars of the Apol-

linaris Company, Limited, and indeed he has not come forward at all to testify in answer to the charges of fraud which have been brought against him and substantiated by a large array of witnesses. The record of those cases was not even offered in evidence. There is no claim that the defendant has expended money or built up any business in good faith on the strength of anything that complainant did, and the only excuse which is offered is that there were others who did likewise. That this is no defense at all is well established.

Singer Mfg. Co. *vs.* June Mfg. Co., 163 U. S., 169, 202.
Cuervo *vs.* Jacob Kenkel Co., 50 F. R., 471.
Gillott *vs.* Esterbrook, 47 Barb., 455.
Filley *vs.* Fassett, 44 Mo., 168.
Taylor *vs.* Carpenter, 3 Story, 458.

In deciding this case against complainant the Courts below therefore necessarily acted, not on the proofs offered in this case, but on the proofs offered in some other case to which this defendant was not a party and which was not by stipulation connected with the present case in any shape whatever. This, we respectfully submit, the Courts below had no power to do.

In re Manderson, 51 *F. R.*, 501.
Am. Fibre Chamois Co. vs. *Buckskin-Fibre Co.*, 72 *F. R.*, 508, 514.
Brown vs. *Piper*, 91 *U. S.*, 37.

The principle of *res adjudicata* cannot be invoked, because the parties in the two suits are not the same, nor is there any priorty of parties or subject matter. Public interests or the convenience of the public cannot be legitimately claimed for it, because the public welfare cannot be served by sanctioning and perpetuating an intended fraud, found by the Circuit Court to have been committed.

In order to enable the Court below to take judicial

notice of the fact that the name Hunyadi had become public property in this country it would have been necessary and essential that knowledge of this fact was in the possession of the Court without resorting to any evidence in this case or any other case. There is certainly no foundation for making such a broad claim on behalf of the imitators of Saxlehner's label. The evidence in this case is overwhelmingly to the effect that the name "Hunyadi" is even nowadays recognized by the medical profession, by dealers in mineral waters, druggists, grocers and the public as belonging properly only to the Hunyadi Janos water and therefore to the complainant. The Circuit Court even came to the conclusion that the other dealers in mineral waters "*could not name their waters 'Hunyadi'*," although for the reasons stated by the learned Judge delivering the opinion of the Circuit Court he believed himself compelled to find that those dealers could use the name "Hunyadi" in connection with some other suffix than "Janos." To this conclusion he came on the theory of a legal abandonment brought about by Saxlehner's consignee whom he deemed sufficiently enabled by circumstances to make such abandonment. The Circuit Court did not find that the evidence disclosed that the name Hunyadi had become a part of the English language and as such properly descriptive of Hungarian bitter waters or bitter waters in general, and indeed there would be no warrant in the evidence for such a contention. He also decided in terms that Saxlehner was not guilty of laches in not proceeding earlier and on that point we submit the evidence sustains the view of the Circuit Court and not that of the Circuit Court of Appeals. Saxlehner and the complainant resided on another continent. In this country there was only a consignee who was shown to have been almost constantly in litigation with complainant and her predecessor. That consignee was also shown to have laid a plan of defrauding Saxlehner by gradually undermining his right and title to the

name so as to be able to take advantage of it for its own purposes upon a termination of the contract which it had in its power to bring about at any time. Previous to the year 1895, when Kalman Saxlehner came to this country, the complainant had no business representative here, and there is no proof in the case that of the doings of the defendant or other infringers in this country she had any earlier notice. No attempt has been made in this case to prove such notice on her part, and there are no circumstances which would raise a presumption of such knowledge. The fact that Andreas Saxlehner registered his trade-mark Hunyadi in this country in the year 1887, proves conclusively his intention to claim this mark for himself, and the fact that complainant litigated her rights against defendant's principal in Hungary from 1891 until 1896, is evidence of an energetic insistance on those rights, and disproves any charge of laches.

It is with a sense of deep conviction of the justice of complainant's claim under these circumstances, that we respectfully submit that the Circuit Court of Appeals did not apply the principles laid down by this Court in deciding the cases of *McIntire* vs. *Pryor*, 173 *U. S.*, 38; *McLean* vs. *Fleming and Holt* vs. *Menendez*.

When that litigation was ended, in October, 1896, she gave notice by her attorneys to the defendant to stop (Record, p. 56), and in the month of January, 1897, commenced the present suit (Record, p. 8). The defendant, a few months after the commencement of the action, discontinued the use of the red and blue label, but did not discontinue the use of the name "Hunyadi Lajos," and has since claimed to be entitled to the use of each of them.

It is evident, therefore, that the present record does not disclose any kind of defense which would be available to the defendant, and that complainant is clearly entitled to relief against him in the manner as prayed in her bill of complaint.

An account of damages and profits has only been

withheld when the defendant's infringement had been suffered to continue for years with full knowledge and no reasonable effort was made by the complainant to assert his rights against the same, on the ground of an implied acquiescence in the doings of the defendant. No such acquiescence being shown, but on the contrary, a long continued contest about the same questions with defendant's principal in Hungary, a decree for profits and damages such as granted by the Circuit Court was therefore clearly justified, but should have been extended to the use of the name "Hunyadi" for the reasons above stated.

Collins Co. *vs.* Oliver Ames & Sons' Corporation, 20 Blatchf., 542.
Estes *vs.* Leslie, 27 F. R., 22.
Sawyer *vs.* Kellogg, 9 F. R., 601.
Graham *vs.* Plate, 40 Cal., 598.
Benkert *vs.* Feder, 34 F. R., 534.
Pitts *vs.* Hall, 2 Blatchf., 229.
Atlantic Milling Co. *vs.* Robinson, 20 F. R., 217, and 27 F. R., 24.

We therefore respectfully submit that the decree of the Circuit Court of Appeals in this case should be reversed in all its parts and that the complainant should be accorded a perpetual injunction against the unlawful use of the name "Hunyadi" and against any imitation of the red and blue label, together with an account of the profits and damages and the costs of the suit.

Respectfully submitted,

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ARTHUR v. BRIESEN.
ANTONIO KNAUTH.

Of Counsel for Petitioner.